

US EPA ARCHIVE DOCUMENT

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:) Docket No.: CWA-09-2010-0005
)
)
Hawaii Stevedores, Inc.) ADMINISTRATIVE COMPLAINT,
) NOTICE OF PROPOSED PENALTY,
965 North Nimitz Highway) AND NOTICE OF OPPORTUNITY
) FOR HEARING
Honolulu, HI 96817-4572)
)
Respondent.) Proceedings Under Section 309(g)(2)(B) of the
) Clean Water Act, as amended, 33 U.S.C. §
) 1319(g)(2)(B)

COMPLAINT

Statutory Authority

The United States Environmental Protection Agency (“EPA”) issues this Administrative Complaint, Notice of Proposed Penalty, and Notice of Opportunity for Hearing (“Complaint”) pursuant to Section 309(g) of the Clean Water Act (the “CWA” or “the Act”), 33 U.S.C. § 1319(g). The authority to take action under Section 309(g) of the Act, 33 U.S.C. § 1319(g), is vested in the Administrator of the EPA. The Administrator has delegated this authority to the Regional Administrator, EPA, Region 9, who in turn has delegated it to the Director of the Water Division of EPA, Region 9, who hereby issues this Complaint.

Statutory and Regulatory Framework

1. The objective of the Act is to restore and maintain the chemical, physical and biological integrity of the nation's waters. CWA § 101(a), 33 U.S.C. § 1251(a). To accomplish this objective, Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants by any person into waters of the United States except as in compliance with the Act, including compliance with a permit issued pursuant to Section 402 of the Act,

2. Section 402 of the Act, 33 U.S.C. § 1342, establishes the National Pollutant Discharge Elimination System (“NPDES”) permit program. Under Section 402 of the Act, 33 U.S.C. § 1342, EPA and states with EPA-approved NPDES programs are authorized to issue permits governing the discharge of pollutants from regulated sources.

3. Section 402(p) of the Act, 33 U.S.C. § 1342(p), and EPA’s implementing regulations at 40 C.F.R. § 122.26, require NPDES permit authorization for discharges of stormwater associated with industrial activity. Facilities engaged in industrial activity, as defined by 40 C.F.R. § 122.26(b)(14), must obtain NPDES permit authorization if they discharge or propose to discharge stormwater into waters of the United States.

4. Marine Cargo Handling Services, Standard Industrial Classification (“SIC”) Code 4491, fall under SIC Major Group 44. Pursuant to 40 C.F.R. § 122.26(b)(14)(viii), transportation facilities classified under SIC Major Group 44 are considered to be engaged in industrial activity and are therefore required to obtain an NPDES permit pursuant to Section 402(p) of the Act, 33 U.S.C. § 1342(p).

5. Section 308(a) of the Act, 33 U.S.C. § 1318(a), authorizes EPA to, *inter alia*, require the owner or operator of any point source to establish records, make reports, or submit other reasonably required information, including individual and general NPDES permit applications.

6. The State of Hawaii (“State”) has an EPA-approved NPDES program, and issues permits, including stormwater permits, through its Department of Health (“DOH”). On October 25, 2002, DOH adopted the NPDES General Permit Authorizing Discharges of Stormwater Associated with Industrial Activities, Hawaii Administrative Rules (“HAR”) Chapter 11-55, Appendix B (hereinafter referred to as the “General Permit”), which became effective November 7, 2002. That permit was reissued and the General Permit that is currently effective is dated October 22, 2007, and expires on October 21, 2012.

7. An owner seeking coverage under the General Permit must submit a notice of intent (NOI) to DOH thirty days prior to commencing industrial operations or thirty days prior to the expiration of existing permit coverage. HAR § 11-55-34.08(j); General Permit § 4(a). Industrial stormwater dischargers that do not submit an NOI must submit an application for an individual NPDES permit. HAR § 11-55-04(a).

Factual Background

8. Hawaii Stevedores, Inc. (“Respondent” or “Hawaii Stevedores”) is a Hawaii corporation.

9. Respondent operates a marine cargo and handling business at various locations in Honolulu Harbor, including Pier 1, where Respondent has operated since approximately 1991. Since 2008, Respondent’s Pier 1 location has included a Mobile Crane Facility, where Respondent maintains and repairs vehicles (the “Facility”).

10. Data from the Honolulu International Airport rain gauge, which is located approximately six (6) miles from the Facility, indicate there were no fewer than forty-eight (48) days with rainfall over 0.1 inches at the Facility (including thirteen (13) days with 0.5 inches or more of rainfall) from July 1, 2008 to September 14, 2010.

11. Stormwater runoff at the Facility collects and flows to two on-site storm drains (designated “SD1” and “SD2”) that discharge to Honolulu Harbor.

12. Honolulu Harbor is listed as an “impaired” water for turbidity and trash by the State of Hawaii pursuant to Section 303(d) of the Act, 33 U.S.C. § 1313(d).

13. On December 8, 2008, representatives of EPA and DOH inspected the Facility to evaluate compliance with the General Permit and found Respondent had not submitted an NOI to DOH or otherwise sought or received NPDES permit coverage for the stormwater discharges

from the Facility. The inspectors also observed sources of pollutants exposed to stormwater at the Facility.

14. On September 25, 2009, EPA issued Respondent a Findings of Violation and Order for Compliance, EPA Docket No. CWA 309(a)-09-018 (the “2009 Order”), which required Respondent to obtain General Permit coverage and bring the Facility into compliance with the General Permit.

15. On or around November 25, 2009, Respondent submitted an NOI to DOH seeking coverage under the General Permit for the Facility. On or around December 10, 2009, a representative of DOH informed Respondent that its NOI was incomplete. On or around June 21, 2010, Respondent submitted a revised NOI and SWPCP to DOH.

16. On or around, September 15, 2010, DOH sent Respondent a Notice of General Permit Coverage.

Findings of Violation

Count 1

Discharges Without an NPDES Permit

17. The facts stated in paragraphs 1 through 16 are re-alleged and incorporated herein.

18. Respondent is a “person” under Section 502(5) of the Act, 33 U.S.C. § 1362(5).

19. Stormwater runoff from the Facility contains “pollutants,” including industrial waste, as defined in Section 502(6) of the Act, 33 U.S.C. § 1362(6).

20. SD1 and SD2 are “point sources” as defined by Section 502(14) of the Act, 33 U.S.C. § 1362(14).

21. Stormwater runoff from the Facility that discharges to Honolulu Harbor, is a “stormwater discharge associated with industrial activity” as defined by 40 C.F.R. § 122.26(b)(14).

22. Honolulu Harbor is a “water of the United States,” as defined at 40 C.F.R. § 122.2, and is therefore a “navigable water,” as defined at Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

23. Upon information and belief, each of the forty-eight (48) rainfall events between July 1, 2008 and September 14, 2010 at the Facility generated stormwater associated with industrial activity that resulted in the “discharge of pollutants,” as defined at Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

24. Each stormwater discharge from the Facility between July 1, 2008 and September 14, 2010 was an unauthorized discharge to waters of the United States and, together, the discharges constitute no fewer than forty-eight (48) days of violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a).

Count 2

Failure to Submit an NOI for General Permit Coverage

25. The facts stated in paragraphs 1 through 24 are re-alleged and incorporated herein.

26. Section 308(a) of the Act, 33 U.S.C. § 1318(a), and 40 C.F.R. § 122.21, require dischargers of stormwater associated with industrial activity to submit information in an application for an NPDES permit prior to commencing industrial activity.

27. Respondent’s failure to submit an NOI for coverage under the General Permit or an individual NPDES permit application before commencing industrial activities at the Facility constitutes a violation of Section 308(a) of the Act, 33 U.S.C. § 1318(a), and 40 C.F.R. § 122.21.

NOTICE OF PROPOSED ORDER ASSESSING PENALTIES

28. Section 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B), authorizes the assessment of administrative civil penalties in an amount not to exceed \$10,000 per day for each day during which the violation continues, up to a maximum penalty of \$125,000. Pursuant to the Federal

Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, et seq.; the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, et seq.; and the Civil Monetary Penalty Inflation Adjustment Rule, 73 FR 75340 (Dec. 11, 2008) (codified at 40 C.F.R. Part 19), the administrative assessment of civil penalties may not exceed eleven thousand dollars (\$11,000) per day for each day during which the violations continued through January 12, 2009 and may not exceed sixteen thousand dollars (\$16,000) per day for each day during which the violations continued after January 12, 2009, up to a maximum of one hundred and seventy-seven thousand and five hundred dollars (\$177,500).

29. The proposed penalty is based upon the facts stated in this Complaint; the nature, circumstances, extent, and gravity of the violation; and with respect to the violator, ability to pay, any prior history of such violation, the degree of culpability, economic benefit or savings resulting from the violation, and such other matters as justice may require.

30. Respondent's violations in this case are significant. Respondent operated the Facility without NPDES permit coverage and discharged stormwater associated with industrial activity on at least forty-eight (48) occasions between July 2008 and August 2010. Moreover, through at least September 2009, Respondent failed to implement adequate stormwater controls at the Facility. The result of Respondent's failure to maintain adequate stormwater controls at the Facility was that the discharge of pollutants in stormwater to waters of the United States was not controlled.

31. Based on the foregoing Findings of Violations, and pursuant to Section 309(g) of the Act, 33 U.S.C. § 1319(g), EPA Region 9 hereby proposes to issue a Final Order assessing a civil administrative penalty against Respondent in an amount not to exceed the statutory maximum penalty of one hundred and seventy-seven thousand and five hundred dollars (\$177,500).

32. EPA has consulted with the State of Hawaii regarding EPA's intention to seek civil administrative penalties against Respondent.

33. Neither assessment nor payment of a civil administrative penalty pursuant to Section 309(g) of the Act, 33 U.S.C. § 1319(g), shall affect Respondent's continuing obligation to comply with the Act, and with any separate compliance order issued under Section 309(a) of the Act, 33 U.S.C. § 1319(a), for the violations alleged herein.

ANSWER AND NOTICE OF OPPORTUNITY TO REQUEST A HEARING

34. To avoid being found in default, which constitutes an admission of all facts alleged in this Complaint and a waiver of the right to hearing, Respondent must file a written answer and request for hearing within thirty (30) days of service of this Complaint. The answer shall clearly and directly admit, deny, or explain each of the factual allegations contained in this Complaint with respect to which Respondent has any knowledge, or shall clearly state that Respondent has no knowledge as to particular factual allegations in this Complaint. The answer shall also state (a) the circumstances or arguments which are alleged to constitute the grounds of defense; (b) the facts that Respondent disputes; (c) the basis for opposing any proposed relief; and (d) whether a hearing is requested. The answer shall be filed, in accordance with 40 C.F.R. § 22.5(b)(2) and 22.15 with the Regional Hearing Clerk at the address below:

Regional Hearing Clerk
U.S. EPA Region 9 (ORC-1)
75 Hawthorne Street
San Francisco, California 94105

35. In accordance with Section 309(g)(2) of the CWA, 33 U.S.C. § 1319(g)(2), Respondent may request, within thirty (30) days of receipt of this Complaint, a hearing to contest any material fact contained in the Complaint or to contest the appropriateness of the proposed penalty set forth therein. Such a hearing will be held and conducted in accordance with the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits*, 40 C.F.R. Part 22, a copy of which is enclosed herein.

36. If Respondent requests a hearing, members of the public, to whom EPA is obligated to give notice of this proposed action, will have a right under Section 309(g)(4)(B) of the CWA, 33 U.S.C. § 1319(g)(4)(B), and 40 C.F.R. § 22.45 to be heard and to present evidence on the appropriateness of the penalty assessment.

37. A copy of the Answer and request for hearing and copies of all other documents relating to these proceedings filed with the Regional Hearing Clerk should also be sent to:

Charlotte Withey
Assistant Regional Counsel
Office of Regional Counsel
U.S. EPA Region 9 (ORC-2)
75 Hawthorne Street
San Francisco, California 94105

OPPORTUNITY FOR INFORMAL SETTLEMENT

38. Whether or not Respondent requests a hearing, Respondent may confer informally with EPA to discuss the alleged facts, violations, and amount of the penalty. An informal conference does not, however, affect Respondent's obligation to file a written Answer within thirty (30) days of the Effective Date of the Complaint. The informal conference procedure may be pursued simultaneously with the adjudicatory hearing procedure.

39. Any settlement reached as a result of an informal conference will be embodied in a written Consent Agreement and Final Order. The issuance of the Consent Agreement and Final Order will constitute waiver of Respondent's right to a hearing on any matter to which Respondent stipulated.

40. If a settlement cannot be reached through an informal conference, the filing of a written Answer within thirty (30) days of the Effective Date of this Complaint will preserve Respondent's right to a hearing.

41. EPA encourages all parties against whom a penalty is proposed to explore the possibility of settlement. To request an informal conference, Respondent should contact Charlotte Withey, Assistant Regional Counsel, at (415) 972-3915 or withey.charlotte@epa.gov.

PUBLIC NOTICE

42. Section 309(g)(4) of the Act, 33 U.S.C. §1319(g)(4), and 40 C.F.R. § 22.45(b), require EPA to provide public notice of and a reasonable opportunity for comment before finalizing an administrative civil penalty action.

EFFECTIVE DATE

43. This proceeding is initiated by the filing of this Complaint with the Regional Hearing Clerk. For calculation of time frames provided herein, the “Effective Date” of this Complaint is the date of service. Service is complete when the return mail receipt is signed by the Respondent or a duly authorized representative of the Respondent, in accordance with the provisions of 40 C.F.R. §§ 22.5(b) and 22.7(c).

Alexis Strauss, Director
Water Division

September ____, 2010